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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ERIC WILLIAM ATKINSON, Defendant and Appellant.	B288338 (Los Angeles County Super. Ct. No. BA418132)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Perry, Judge. Affirmed.

Michael Allen; Richard B. Lennon, Acting Executive Director, and Suzan E. Hier, Staff Attorney, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb, Margaret E. Maxwell and Shezad H. Thakor, Deputy Attorneys General, for Plaintiff and Respondent.

On September 17, 2013, defendant and appellant Eric William Atkinson robbed the Happy Bargain 99 Cent Store and fatally shot Martha Sanchez, the store's cashier.

A jury convicted defendant of first degree murder (Pen. Code, § 187, subd. (a); count 1),[1] dissuading a witness by force or threat (§ 136.1, subd. (c)(1); count 2), and possession of a firearm by a felon (§ 29800, subd. (a)(1); count 3). The jury found true the special circumstance that the murder was committed while defendant was engaged in the commission of a robbery (§§ 190.2, subd. (a)(17), 211), and also found true that defendant personally and intentionally discharged a firearm, causing great bodily injury and death (§ 12022.53, subd. (d)). Defendant admitted that he had suffered a prior felony conviction.

On count 1, defendant was sentenced to life in prison without the possibility of parole (LWOP), plus 25 years to life for the firearm enhancement and five years for a serious felony enhancement pursuant to section 667, subdivision (a)(1). On count 2, defendant received an eight-year prison term to run consecutively with the sentence imposed on count 1. The sentence on count 3 was stayed pursuant to section 654. The trial court imposed various assessments and a restitution fine.

In this timely appeal, defendant argues that (1) his LWOP sentence violates the constitutional right to equal protection; (2) the trial court violated due process by imposing the assessments and restitution fine without first finding his ability to pay; and (3) pursuant to Senate Bill Number 1393 (2017-2018 Reg. Sess.) (SB 1393), the matter must be remanded for the trial

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

court to consider exercising its new discretion to strike the previously mandatory five-year serious felony enhancement. We affirm.

DISCUSSION

I. Defendant's LWOP Sentence Does Not Violate the Right to Equal Protection.

Defendant argues that "California's disparate system of punishing first degree murder" violates his right to equal protection under both the federal and state Constitutions. Specifically, he contends that "first degree felony murderers are similarly situated to first degree willful, deliberate, premeditated murderers[,]" but the former are punished more severely than the latter as a result of "the Legislature's elimination of the possibility of parole in every case where a person is killed during the course of a felony murder." Defendant asserts that this allegedly disparate treatment lacks any rational purpose.

We disagree.[2]

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[2] The People argue that defendant forfeited his equal protection claim by failing to object or argue the issue below. We exercise our discretion to consider defendant's constitutional challenge on the merits. (See *People v. Smith* (2018) 4 Cal.5th 1134, 1178 ["We have . . . consistently considered the merits of attacks on the constitutionality of special circumstance allegations in capital cases even when they were not raised at trial"]; *People v. Bloomfield* (2017) 13 Cal.App.5th 647, 657, fn. 5 [considering equal protection claim raised for the first time on appeal "because it involve[d] a pure question of law that rest[ed] on undisputed facts"].)

A. *Relevant law and standard of review*

"[E]qual protection of the laws" (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7)—guaranteed under both the federal and state Constitutions—essentially "means that persons similarly situated regarding the legitimate purpose of the law should receive like treatment. [Citation.]" (*People v. Morales* (2016) 63 Cal.4th 399, 408.)

"[T]he federal and state [equal protection] clauses are analyzed in substantially the same manner. [Citation.]" (*People v. Wolfe* (2018) 20 Cal.App.5th 673, 686 (*Wolfe*).) No equal protection violation exists if the persons are not similarly situated or treated differently. (*People v. Castel* (2017) 12 Cal.App.5th 1321, 1326.) But if these prerequisites are established and where, as here,[3] "the law challenged neither draws a suspect classification nor burdens fundamental rights," "[w]e find a denial of equal protection only if there is no *rational* relationship between a disparity in treatment and some legitimate government purpose. [Citation.]" (*People v. Chatman* (2018) 4 Cal.5th 277, 288–289.)

We review equal protection claims de novo. (*Wolfe*, *supra*, 20 Cal.App.5th at p. 687.)

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[3] Defendant does not contend that, as a felony murderer, he is a member of a suspect class. Nor could he. (See *Dickerson v. Latessa* (1st Cir. 1989) 872 F.2d 1116, 1119.) And, a criminal defendant "'does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives.' [Citations.]" (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838 (*Wilkinson*).)

B. *Under binding precedent, the felony-murder special circumstance is constitutional.*

Courts have consistently upheld the constitutionality of the felony-murder special circumstance. (See *People v. Covarrubias* (2016) 1 Cal.5th 838, 934; *People v. Bonillas* (1989) 48 Cal.3d 757, 780 ["the statutory scheme making felony murder but not simple murder death eligible does not violate the federal Constitution"].) Our Supreme Court has specifically rejected equal protection challenges like defendant's. (See *People v. Taylor* (1990) 52 Cal.3d 719, 747–748; *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [recognizing that it is "generally accepted that a death penalty law that makes the felony murderer but not the simple murderer death-eligible does not violate the equal protection clause"], superseded by statute on other grounds as stated in *People v. Mil* (2012) 53 Cal.4th 400, 408–409.) We are bound by these cases. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Defendant seemingly acknowledges this precedent and states that he does not ask us to overrule it. But he provides us with no persuasive argument or legal authority to accept his constitutional challenge without disregarding binding case law. On this ground alone, defendant's argument fails.

C. *The Penal Code does not eliminate the possibility of parole for all felony murderers.*

We also reject defendant's argument because it is based on the false premise that LWOP and death are the only punishments available for first degree felony murder. To the contrary, first degree murder based on a felony-murder theory—like all first degree murders—is punishable "by death, imprisonment in the state prison for life without the possibility of

parole, *or* imprisonment in the state prison for a term of 25 years to life." (§ 190, subd. (a), italics added.)

Indulging defendant's contention that first degree murder based on a felony-murder theory (§ 189, subd. (a)) and the felony-murder special circumstance (§ 190.2, subd. (a)(17)) "are functionally identical[,]" the fundamental distinction remains that a prosecutor must allege and prove beyond a reasonable doubt the special circumstance for it to affect and limit the sentencing options (§ 190.4, subd. (a)). Prosecutorial discretion over charging decisions that implicate different sentencing provisions does not violate equal protection provided that the discretionary decision is not based on invidious discrimination. (*U.S. v. Batchelder* (1979) 442 U.S. 114, 123–125; *Wilkinson*, *supra*, 33 Cal.4th at pp. 838–839; *People v. Brown* (2017) 14 Cal.App.5th 320, 339–340; *People v. Wallace* (1985) 169 Cal.App.3d 406, 409–411.) Defendant makes no claim here that the decision to charge him with the felony-murder special circumstance was based on any improper reason.

We conclude that no equal protection violation has occurred and affirm defendant's sentence.

II. The Trial Court Properly Imposed Assessments and a Restitution Fine.

Defendant argues that the trial court erred in imposing a $30 per count court facilities assessment (Gov. Code, § 70373), a $40 per count court operations assessment (Gov. Code, § 1465.8), and a $300 restitution fine (Gov. Code, § 1202.4) without first determining that he is able to pay, in violation of his right to due process. In support, he relies on *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1163–1173 (*Dueñas*).

We are not convinced. First, as pointed out by the People, defendant forfeited his challenge to the trial court's imposition of any assessments or restitution. (See *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155 [because "*Dueñas* applied law that was old, not new," the argument was foreseeable].) Even before *Dueñas*, a trial court could consider a defendant's inability to pay. (See, e.g., *People v. Trujillo* (2015) 60 Cal.4th 850, 853–854; *People v. Nelson* (2011) 51 Cal.4th 198, 227; *People v. Avila* (2009) 46 Cal.4th 680, 729.) Yet defendant did not object or otherwise raise his concern about an alleged inability to pay the assessed amounts. As a result, the issue has been forfeited on appeal. (See, e.g., *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468–1469.)

Setting aside this procedural obstacle, defendant still offers no basis for reversal. Based on the constitutional guarantee of due process and ban on excessive fines, *Dueñas* held that trial courts may not impose three of the standard criminal assessments and fines—namely, the $30 court facilities assessment (Gov. Code, § 1465.8), the $40 court operations assessment (Gov. Code, § 70373), and the $300 restitution fine (Gov. Code, § 1202.4)—without first ascertaining the "defendant's present ability to pay." (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1164, 1171, fn. 8.) We need not decide whether we agree with *Dueñas* because defendant is not entitled to a remand even if we accept *Dueñas*. That is because the record in this case, unlike the record in *Dueñas*, indicates that defendant has the ability to pay the imposed assessments and restitution fine. A defendant's ability to pay includes "the defendant's ability to obtain prison wages . . . ." (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837; see also *People v. Gentry* (1994) 28 Cal.App.4th 1374, 1376–

1377.) Prisoners earn wages ranging from $12 per month (for the lowest skilled jobs) to $72 per month (for the highest). (Cal. Dept. of Corrections & Rehabilitations, Operations Manual, §§ 51120.6, 51121.10 (2019).) At these rates, given the length of defendant's sentence, he will have enough money to pay the assessments and fine.

Even if defendant does not voluntarily use his wages for this purpose, the state may garnish between 20 and 50 percent of those wages to pay the restitution fine. (§ 2085.5, subds. (a) & (c); *People v. Ellis* (2019) 31 Cal.App.5th 1090, 1094.) Because defendant "points to no evidence in the record supporting his inability to pay" (*People v. Gamache* (2010) 48 Cal.4th 347, 409), a remand would serve no purpose.

III. Remand for the Trial Court to Consider Striking the Serious Felony Enhancement Is Not Required.

While this appeal was pending, SB 1393, effective January 1, 2019, amended section 667, subdivision (a), and section 1385, subdivision (b), to give trial courts discretion to strike the imposition of a five-year sentencing enhancement for a prior serious felony conviction. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).)

Although SB 1393 applies retroactively to nonfinal judgments of conviction where a serious felony enhancement was imposed at sentencing (*Garcia*, *supra*, 28 Cal.App.5th at pp. 971–972), "we are not required to remand to allow the [trial] court to exercise its discretion if 'the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the] . . . enhancement' even if it had the discretion. [Citation.] [¶] The trial court need not have specifically stated at sentencing it would not strike the

enhancement if it had the discretion to do so. Rather, we review the trial court's statements and sentencing decisions to infer what its intent would have been. [Citations.]" (*People v. Jones* (2019) 32 Cal.App.5th 267, 273 (*Jones*).)

We agree with the People that remand is not required here, where the trial court's comments and exercise of discretion in other respects demonstrated that it would not have stricken the serious felony enhancement had it been within its discretion to do so.

At sentencing, the trial court declined to exercise its discretion to strike the 25-year-to-life firearm enhancement because it would not "be appropriate in this case." The court explained, "This shooting was, in the court's opinion, a very gratuitous and senseless act. It's clear the defendant acted with a depraved heart and a desire to harm the woman who was a well-liked employee, pleasant to all customers, and a mother of five. This is an extremely sad case given the acts that were committed by the defendant." On count 2 for dissuading a witness, the trial court imposed the high term of four years, which was doubled to eight for the prior strike. The court found "no mitigating circumstances"; rather, it considered the "aggravating circumstance" that "the defendant has a significant criminal history, including many drug convictions."

Based on the trial court's view of defendant's culpability and its decisions to impose a high sentencing term and not to strike the firearm enhancement, "we conclude the trial court would not have dismissed defendant's prior serious felony even if it had discretion to do so. [Citations.]" (*Jones*, *supra*, 32 Cal.App.5th at p. 274.)

In support of remand, defendant cites *People v. Billingsley* (2018) 22 Cal.App.5th 1076 (*Billingsley*). We find that case distinguishable. In *Billingsley*, the appellate court concluded that remand was appropriate because "the record [did] not 'clearly indicate' the [trial] court would not have exercised discretion to strike the firearm allegations had the court known it had that discretion." (*Id.* at p. 1081.) The trial court had not "express[ed] an intention to impose the maximum possible sentence" (*ibid.*); rather, it described the facts of the case "as 'tragic' and 'unfortunate, in many ways, for [the defendant]'" (*id.* at p. 1080). Here, in contrast, the trial court expressed no sympathy for defendant and exercised its discretion where it could to impose the maximum sentence.

Because it would be an idle act under these circumstances, we decline to remand for resentencing.

DISPOSITION

The judgment is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ